IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-117

MICHAEL P. VITALE,

Petitioner,

VERSUS

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES A. McPHERSON
McPHERSON, WEBER, ZAINEY
& BOOTH
419 Carondelet Street
New Orleans, Louisiana 70130
Attorney for Appellant

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE
UNITED STATES AND THE ASSOCIATE JUSTICES OF THE
SUPREME COURT

The petition of Michael P. Vitale, applying for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit which was rendered on June 8, 1979, in case number 78-5689 of the Docket of the said Court of Appeals, with respect shows:

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is officially reported at pages 5353-55 of the

1979 opinions of the Fifth Circuit and is published at __F.2d _____. There were no written opinions of the District Court which are relevant to the issues presented herein.

A copy of the Fifth Circuit's opinion is annexed hereto as Appendix A.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the Court below was rendered and entered on June 8, 1979. A petition for rehearing was not timely sought for the reasons stated in the Motion for Leave to File out of Time Petition for Rehearing and Motion for a Stay or Recall of Mandate, a copy of which is annexed hereto and marked Appendix B. No action has been taken by the Court below on this motion which necessitates that petitioner file this petition prior to the formal disposition of the said motion.

Jurisdiction of this Court to review the judgment of the Court below is conferred by 28 U.S.C. §1254(1).

THE QUESTIONS PRESENTED

1. Whether petitioner was denied a fair trial by an impartial jury when the Trial Court, over timely objection by the defense, objected to testimony that the Louisiana State Police had received "information of possible criminal activity conducted at this particular bar" which was owned by petitioner when such activity did not relate to any issue relevant to this case and the Court below found there to be "little legitimate justification" for the admission of the said evidence except "to show that the police official was on business, not a vigilante, * * *[y]et we have previously allowed police agents to testify in a similar fashion for the limited purpose of explaining why they were at a particular location."

2. Whether petitioner was denied a fair trial when the jury was instructed in accordance with the Fifth Circuit's

decision in *United States v. Shirling*, 572 F.2d 532 (5 Cir. 1978), which was not the law at the time of petitioner's conduct and thus allowed the jury to apply the Shirling precedent *ex post facto* to the petitioner's conduct.

3. Whether petitioner was denied due process of law when the Government failed to establish that petitioner was engaged in a "business" of "dealing in firearms without a license," as the term "business" had been interpreted in the jurisprudence preceeding petitioner's conduct to require proof that the person performing the alleged activity did so "in the expectation of profit or other benefit" in the pursuit of the sale of firearms.

4. Whether plain error denying petitioner's right to have the jury properly instructed on the reasonable doubt standard (which is constitutionally required) occurred when the Trial Court summarized the reasonable doubt standard in the following language, "Proof beyond a reasonable doubt is such proof as you yourself would be willing to rely and act upon in the promotion or conduct of your own personal affairs."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The present case involves the Fifth Amendment Due Process Clause, the Sixth Amendment Jury Trial Clause, 18 U.S.C. §922(a)(1), and Rules 29(a) and 52(b), F.R.Cr.P.

The Fifth Amendment, in relevant part, provides:

> No person shall * * * be deprived of life, liberty or property, without due process of law * * *.

The Sixth Amendment, in relevant part, provides:

> In all criminal prosecutions, the accused shall

enjoy the right to a speedy and public trial, by an impartial jury * * *.

Title 18, United States Code, §922 (a) (1) provides:

(a) It shall be unlawful____(1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce * * *.

Rule 29 (a), F.R.Cr.P., provides:

Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

Rule 52(b), F.R.Cr.P., provides:

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

This case can be summarized as the Fifth Circuit did in the

following language (Slip Opinion, Appendix A, p. 5354):

Michael P. Vitale was charged with the crime of engaging in the business of dealing in firearms without a license. 18 U.S.C. §922 (a) (1). The parties stipulated that he did not have a license to deal in firearms and Vitale admitted that he had sold some firearms and had arranged for a friend to sell others. The only issue for the jury was whether he was engaged in a business [of selling firearms]. The jury found that he was.

During the course of the testimony of Louisiana State Police undercover agent, Trooper Terry Mayeux, the witness was asked how he had come to be at the bar in Plaquemine, Louisiana, which petitioner owned. The officer commenced to answer the question, "The State Police, Detective Section, received information that there was possible ____," at which time defense counsel objected to any hearsay testimony being elicited from the said witness. The prosecutor said, "Your Honor, it is general only in nature and merely goes to explain why he's there. We've not going to go into any of that information." The Court then overruled petitioner's objection and permitted the Government to elicit the following prejudicial testimony (Tr. 4-5):

> The Detective Section, my supervisor, had received information of possible criminal activity conducted at that particular bar.

The Court of Appeals did not find this testimony to be error which required the reversal of the judgment below because "Fifth Circuit precedent permits such evidence provided that it is simply background information showing the police officers did not act without reason and, in addition, that it does not point specifically to the defendant." Slip op., p. 5354, Appendix A, *infra* at A-1. The Court held, "In this instance, both requirements were fulfilled. Detective Mayeux's brief testimony on this point was a simple explanation of why he was at the

bar, the response did not specifically point to Vitale or implicate him personally in any way. The Court below held that the Trial Court's failure to instruct the jury *sua sponte* on the proper use of such testimony was not plain error. And since Detective Mayeux's testimony did not contradict petitioner's position on any contested question the failure to give the limiting instruction was not so prejudicial that petitioner's substantive rights were harmed in any way.

Following the conclusion of the Government's case, and at the conclusion of all the evidence, the defense moved for entry of a judgment of acquittal on the ground the Government had not proved that petitioner was in the business of dealing in firearms but had, at most, sold four weapons of his own to the undercover agents, offered for sale a pistol belonging to an employee of his, and had put the agents in contact with Kenneth Canova who offered them 39 weapons of his own which he had obtained as an inheritance from his father and four others the petitioner had added to be sold. The question then arose with regard to the definition of the "business" of dealing in firearms. The Trial Court overruled petitioner's motion on the ground that (Tr. 70):

> Under the charge I will give the jury, they would certainly be able to return a contrary verdict if they so desire.

The particular charge to which the Court referred was one it devised to follow the recent decision in *United States v. Shirling*, 572 F.2d 532 (5 Cir. 1978), which had not been decided at the time of the conduct for which petitioner was prosecuted. The charge actually given was as follows (Tr. 177-180)

> So we come down to the crux of this case, ladies and gentlemen, and which obviously is the question which you have to answer, and that is whether or not the defendant engaged in the business of dealing in

> firearms. The defendant contends that he cannot be found to be engaged in the business of dealing in firearms unless the Government proves that the dealing was part of his livelihood and that it was carried on with a profit motive. He contends there was no profit motive and it was not part of his livelihood.

The Government, on the other hand, contends that there is no need that the profit motive be shown.

> Now, the law that you will apply to this case is that the expectations of profit are not the determinative factor. If you decide that the evidence shows that the defendant made or hoped to make a profit such evidence may be relevant to the question of whether or not be engaged in the business of dealing in firearms.
>
> In other words, you are not precluded from considering the question of whether or not there was a profit motive; that may be one of the factors that would lead you to believe that he was or was not engaged in the business, but it is not an absolute requirement and the sole determining factor.
>
> Other factors must be considered such as the continuing or repeated nature of sales, the representations made to prospective buyers, whether or not the person holds himself out as a source of firearms, and these factors may suffice to prove engaging in the business of dealing in firearms even in the absence of any evidence of a profit motive.
>
> An isolated transaction or even more than one isolated transaction involving the sale of a firearm my not be sufficient to constitute being in the business of dealing in firearms; but the repeated transactions involving the elements just described, that is, the ques-

tion of repeated sales, representations made to prospective buyers, whether or not he holds himself out as a source of firearms, when taken as a whole, may be sufficient to constitute engaging in the business of dealing in firearms.

You, the jury, must decide from all of the evidence before you whether or not you believe that the Government has proven by evidence in this case beyond a reasonable doubt that the defendant so engaged. In short, the law is that anyone who engages in the business of dealing in firearms, if they have guns on hand or are ready and able to secure them, in either case for the purpose of selling some or all of them to such persons as they might from time to time conclude to accept as customers.

Collectors of guns, who trade guns, are not necessarily in the business of dealing in firearms; but trading or exchanging guns may be considered by the jury along with the other activities in making your determination of whether under the facts of this case, this defendant was engaged in the business of dealing in firearms.

The defense also objected to this charge, recognizing that the definition of the "business of dealing in firearms" accorded with the Fifth Circuit's recent decision in *Shirling* but arguing that the application of the *Shirling* definition in this case does not accord with the normal concept of the term "business" as it would be understood by ordinarily intelligent people and that the *Shirling* charge should therefore not be given in this case. (Tr. 186-187) The District Court confirmed that *Shirling* was the source of the charge on the definition of "the business of dealing in firearms" but did not modify its charge as petitioner requested to encompass the definition of that business as it existed prior to *Shirling* ____ the period

in which the petitioner's activities occurred.

The Court of Appeals wrote with regard to these two issues (Slip Op., Appendix A, p. 5355):

> Vitale next argues that he was entitled to a directed verdict because the government failed to prove that he was in the business of selling guns for profit. Vitale argues that, before ***United States v. Shirling [supra]*** was decided, the government had been required to prove that the defendant sold guns for profit. This is an incorrect interpretation of ***Shirling's*** impact on the prior law. ***Shirling*** simply confirmed that a particular jury instruction on the absence of a profit motive "correctly represented the controlling law." *id.* at 532. There is no merit to the argument that Vitale suffered from a retroactive application of new law, because ***Shirling*** did not alter the terms or interpretation of the firearms statute, a law aimed "rather broadly at those who hold themselves out as a source of firearms." *id.* at 532. For the same reasons, the trial court properly relied on ***Shirling*** as the source for the jury charge on profit motive.

The Trial Court gave the following charge to the jury on the reasonable doubt standard of proof (Tr. 170-171):

> It is rarely possible to prove anything to an absolute certainty. Therefore the law requires in a criminal case that the Government carry the burden of proving the person guilty beyond a reasonable doubt. Now proof beyond a reasonable doubt means beyond a fair doubt. A reasonable doubt is a fair doubt based upon common sense and arising from the state of the evidence. ***Proof beyond a reasonable doubt is such proof as you yourself would be willing to rely and act upon in the promotion or conduct of your own personal***

affairs.

> A defendant can never be convicted on suspicion or conjecture. A reasonable doubt may arise not only from the evidence produced, but from lack of evidence produced. Since the burden is always upon the prosecution or the Government to prove the accused guilty beyond a reasonable doubt of each essential element of the crime charged, the defendant has a right to rely on the failure of the prosecution to establish that proof. In other words, it is not necessary that the defendant prove his innocence. He may rely, if he wishes, upon the failure of the Government to establish his guilt beyond a reasonable doubt.
>
> A defendant may also rely upon evidence brought out on cross-examination of the Government's witnesses. The law does not impose upon the defendant any obligation at all to produce any witnesses or any evidence. A reasonable doubt exists in any case when after careful and impartial consideration of all of the evidence in the case, the jurors do not feel convinced to a moral certainty that the defendant is guilty of the crime charged.

The defense did not object to the charge given and raised the issue as "plain error" under Rule 52(b), F.R.Cr.P., on the appeal of this case. The Court of Appeals, while recognizing that the italicized language in the foregoing instruction was improper, held it was not plain error. The Court said, "Although one sentence in the charge was not proper, the court's charge, taken as a whole, adequately conveyed the correct meaning of reasonable doubt to the jury." Slip op., Appendix A, p. 5355.

With the trial streamlined to the single issue of whether petitioner was engaged in the "business of dealing in firearms,"

the trial court giving the charge which petitioner contends was not the law at the time of his conduct, and the reasonable doubt charge equating the required standard of proof with "such proof as you yourself would be willing to rely and act upon in the promotion or conduct of your own personal affairs," the jury deliberated for an hour and forty-five minutes before reaching a unanimous verdict that petitioner was guilty of engaging in the business of dealing in firearms without a license. The Trial Court thereafter sentenced petitioner to serve 18 months in the custody of the Attorney General.

REASON FOR GRANTING THE WRIT

1. THE JUDGMENT OF THE COURT BELOW HAS SANCTIONED A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN FEDERAL COURTS WHICH RESULTED IN AN UNFAIR TRIAL TO PETITIONER AND CALLS FOR THE EXERCISE BY THIS COURT OF ITS POWER OF SUPERVISION OVER THE LOWER COURTS.

The objectionable evidence, which was permitted after petitioner's timely exception thereto on grounds it was inadmissible and prejudicial hearsay, was (Tr. 4-5):

> The Detective Section, my supervisor, had received information of possible criminal activity conducted at that particular bar.

The evidence showed that petitioner owned and operated the bar to which reference was made for the two and one-half years preceding the trial of this case. The only other person mentioned in connection with the operation of the bar was an off-duty Deputy Sheriff, Larry Landry. The testimony also showed that, as an accommodation to his customers, petitioner would sell things for them which they brought to his bar, with-

out receiving a commission. (Tr. 101-102) ATF Agent Kirby Russell testified that one of the weapons sold to him by petitioner had been stolen. Agent Russell also testified that petitioner allegedly said "that he dealt in anything except narcotics and woman, and he had considered dealing in these before." (Tr. 29) The totality of this testimony could have led to no other conclusion than that petitioner was the one engaged in the conduct of criminal activities at the bar, contrary to the holding of the Court below that "the response did not specifically point to Vitale or implicate him personally in any way." In assessing objections of this nature, the Fifth Circuit in other cases has said that the error must be viewed from the perspective of the evidence as a whole. *United States v. Cain*, 587 F.2d 678, 680 (5 Cir. 1979). Viewed from this perspective, the evidence improperly suggested "a cloud of criminality enveloping the defendant." Slip op., p. 5354, Appendix A, *infra*. The Court below conceded "[t]here is little legitimate justification for it save to show that the police official was on business, not a vigilante, and, when necessary, such evidence can readily be supplied in some other fashion less prejudicial to the defendant." *ibid.* Thus, the Court below noted the erronerously admitted testimony to be "prejudicial to the defendant." Because the attorney for petitioner failed to seek a limiting instruction with respect to this testimony to which he objected on the grounds of hearsay and prejudice, the Court below sought to convert this issue to one for application of the "plain error" rule. Rule 52(b), F.R.Cr.P. This was done on the basis of Rule 105, F.R.Evid., which provides:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 105, however, presupposes the admissibility of the evidence for a legitimate purpose. There was no legitimate purpose

for the admission of the evidence that other criminal activities were suspected to be occurring at petitioner's bar before he ever sold the first firearm to the officers. It was not relevant under Rule 401, F.R.Evid. The jury does not need to be informed why an investigation is conducted. It's purpose and function is to assess the facts established by the investigation. It is the Court's function to protect an accused against "vigilante" activities of the police, not the jury's. Therefore, there is no need to inject into a trial for one alleged offense so called "background information" with respect to other offenses which were possibly occurring. Such evidence is prejudicial and has no probative value to the prosecution, unless deliberate prejudice can be regarded as having probity to the Government's case.

Since the evidence was not legitimately admitted for any relevant purpose, the judgment below based on Rule 106, F.R.Evid. is clearly erroneous. It sanctions the departure from the accepted and usual course of judicial proceedings reflected at least by Rules 401 (relevance) and Rules 801-803 (hearsay) of the Federal Rules of Evidence and it approved the inflammation of the jury against petitioner, in violation of his constitutional right guaranteed by the Sixth Amendment to a fair trial by an impartial jury. Petitioner's substantial constitutional and statutory rights were violated in order to obtain the judgment against him, which should provoke this Court to act to correct the deliberate injustice perpetrated against petitioner when the Trial Court allowed the evidence to which petitioner timely and properly objected and which, when considered with other evidence adduced at this trial, fatually infected the minds of the jurors with at least suspicion if not what they believed to be knowledge that petitioner was engaged in the fencing of stolen property.

2. THE JUDGMENT OF THE COURT BELOW SANCTIONS THE DEPARTURE FROM THE USUAL AND ACCEPTED COURSE OF FEDERAL JUDICIAL PROCEEDINGS AND HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE OPINIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

18 U.S.C. §§922 (a) (1) and 923 (a) (1) require a license and make it unlawful for a person to engage in the "business of * * * dealing in firearms" without a license issued by the Secretary of Treasury. Both of those statutes draw upon the same definitions of "dealer," which is found in 18 U.S.C. §921 (11), which provides:

> The term "dealer" means (A) any person engaged in the business of selling firearms or ammunition at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or (C) any person who is a pawnbroker.
> The term "licensed under the provisions of this chapter (Chapter 44 of Title 18, U.S. Code).

The term "business" is not defined within 18 U.S.C. §921 or elsewhere in the statutes. It had been previously defined by the Fifth Circuit, in *United States v. King*, 532 F.2d 505, reh. den., 536 F.2d 390 (5 Cir. 1976), *cert. den.*, 429 U.S. 860 (1977), to mean "engaging some of one's time, attention and effort * * * in the expectation of profit or other benefit" from the sale of firearms. Other Circuits had similarly construed the term: *United States v. Haffman*, 518 F.2d 80 (4 Cir.), *cert. den.*, 423 U.S. 864 (1975); *United States v. Swinton*, 521 F.2d 1255 (10 Cir. 1975), *cert. den.*, 424 U.S. 918 (1976); *United States v. Powell*, 513 F.2d 1249 (8 Cir.), *cert den.*, 423 U.S. 853 (1975); *United States v. Wilkening*, 485 F.2d 234 (8 Cir. 1973); *United States v. Day*, 476 F.2d 562 (6 Cir. 1973).

In 12 C.J.S., verbo "Business," pp. 761-762, it is pointed out that "two conceptions may attach to the term 'business'; one, that of any regular activity that occupies one's time and attention, with or without a direct profit objective, this meaning being treated under the heading 'Broad Sense' discussed below, the other being such an activity with such a direct profit objective, the meaning in this sense being extensively treated under the heading 'Narrower Sense' discussed below." Prior to the *Shirling* opinion, the Fifth Circuit, in *United States v. King, supra*, and every other appellate court which had considered the matter had construed the term "business of dealing in firearms" to apply the "Narrower Sense" of the word "business" to require a direct profit objective. The Court below, rather than to deal specifically with the prior precedents above cited, hinged its opinion on the statement made in *Shirling* that a particular jury instruction on the absence of a profit motive "; correctly represented the controlling law.' *id.* at 532." The "controlling law" to which reference was therein made, however, was the Court's construction of the legislative intent in promulgating 18 U.S.C. §922 (a) (1), not the law as it had been construed by the Courts in the cited cases to require the showing of a direct profit motive.

Petitioner respectfully disagrees with the holding of the Court below that "*Shirling* did not alter the term or interpretation of the firearms statute." It obviously converted the meaning of the term "business" from the "Narrower Sense" to the "Broad Sense" of the word and applied that new construction of the statute to petitioner's conduct which preceded the *Shirling* case in which that construction was changed.

The refusal of the Court below to apply the *Shirling* case prospectively and its application of the *Shirling* case to petitioner's antecedent conduct clearly violated the opinion of this Court in *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964), in which this Court said:

There can be no doubt that a deprivation of the right to fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. As the Court recognized in *Pierce v. United States*, 314 U.S. 306 [(1941)], "judicial enlargements of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." Even where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot "be cured in a given case by a construction in that very case placing valid limits on the statute," for

> "the objection of vagueness is tow-fold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact. The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss. * * *"

18 U.S.C. §922 (a) (1), as construed by the Courts, clearly required the exhibition of a profit motive in order to bring one's conduct within the scope of the act. That was changed by the Court's ruling in *Shirling*, which, for the reasons stated in *Bouie*, would prevent the *ex post facto* application there of new judicial precedent. The statutory notice requirement of 18 U.S.C. §922 (a) (1) could not have been cured on a trial of this case. The only way legitimate to try this case was on the basis of the law as it had been construed at the time of petitioner's conduct. Since that is possible, petitioner did not urge only that he was entitled to acquittal on the basis of the Government's failure to prove the profit motive but also took the alternative position that the Trial Court erred

in not instructing the jury in accordance with the prevailing judicial constructions at the time of his conduct. While petitioner believes the interpretation in *King* and in the other opinions cited above is correct, mainly because a penal statute must be narrowly construed when it is antiguous and any statute making the "business" of doing a particular act or series of acts is always ambiguous if not limited to the "Narrower Sense," 12 C.J.S., *supra*, it was clearly wrong in this case to apply a precedent which was decided after petitioner's conduct to criminalize conduct which was not thentofore within the scope of the statute as interpreted.

3. THE OPINION BELOW CONFLICTS WITH APPLICABLE PRECEDENT OF THIS COURT.

In *In re Winship*, 397 U.S. 358, 364 (1970), this Court held that proof beyond a reasonable doubt is the constitutionally mandated standard of proof required for a verdict in a criminal case. For the reasons appearing hereinbelow, petitioner respectfully submits the instruction given by the Court below was tantamount to an instruction that the jury convict on a preponderance of the evidence, even though the Court below described the preponderance standard in terms of reasonable doubt. The part of the Trial Court's charge which petitioner submits diminished the standard of proof constitutionally imposed on the Government is the statement (Tr. 170):

> * * * Proof beyond a reasonable doubt is such proof as you yourself would be willing to rely and act upon in the promotion or the conduct of your own personal affairs.

The Court below conceded this "sentence in the charge was not proper" but held that "the court's charge, taken as a whole, adequately conveyed the correct meaning of reasonable doubt to the jury."

In *Holland v. United States*, 348 U.S. 121, 140 (1954), *reh. den.*, 348 U.S. 932 (1955), this Court was called upon to determine whether it was plain error, destructive of the reasonable doubt standard of proof imposed on the Government, for a court to have charged the jury that a reasonable doubt is "the kind of doubt * * * which you folks *in the more serious and important affairs of your own lives* might be willing to act upon." This Court the, Twenty years ago, disapproved such an instruction but did not reverse because "taken as a whole, the instructions correctly conveyed the concept of reasonable doubt." 348 U.S. at 140. This Court said that such a charge should be given in terms of "the kind of doubt that would make a person hesitate to act." *ibid.*

In *Scurry v. United States*, 120 U.S. App. D.C. 374, 347 F.2d 468, 470 (1965), *cert. den.*, 389 U.S. 883 (1968), the Court considered the impact upon the jury of an instruction equating the reasonable doubt standard with the kind of a doubt upon which a juror would be "willing to act * * * in the more weighty and important matters in [his] own affairs." Significantly, the charge at issue herein did not relate to "the more weighty and important" personal affairs of the jurors' lives but related simply to the "promotion or the conduct of your own personal affairs." Tr. 170) Therefore, what the Court said in *Scurry* is doubly true about the instruction equating the reasonable doubt standard to the ordinary personal affairs of the jurors. The Court, in *Scurry*, said:

> Being convinced beyond a reasonable doubt cannot be equated with being "willing to act * * * In the more weighty and important matters in your own affairs." A prudent person called upon to act in an important business or family matter would certainly gravely weigh the often neatly balanced considerations and risks tending in both directions. But in making and acting on a judgment after so doing, such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment. Human

> experience, unfortunately, is to the contrary.
>
> The jury, on the other hand, is prohibited from convicting unless it can say that beyond a reasonable doubt the defendant is guilty as charged. * * *

The Fifth Circuit, in *United States v. Joiner*, 496 F.2d 1314 (5 Cir.), *cert. den.*, 419 U.S. 1002 (1974), and several subsequent cases, has held such an instruction as that disapproved by this Court in *Holland* and the reasons therefor explained in *Scurry* not to present reversible error, with or without an objection. In *United States v. Tobin*, 576 F.2d 687 (5 Cir. 1978), the Court below found that a sentence similar to the one dealing with the "more weighty and important matters" of the jurors' personal affairs might have improperly reduced the burden of proof as to reasonable doubt but, considering the instruction as a whole, the Court found that a statement "defining reasonable doubt in terms of 'moral certainty' insured that the jury would not employ too lax a standard of proof." 576 F.2d at 694. *See*, also, *United States v. Richardson*, 504 F.2d 357 (5 Cir. 1975), in which the Fifth Circuit, by another Panel, criticized the "more weighty and important matters" charge and set forth a preferred form for such an instruction. There thus appears to be no conflict that the Court's charge was erroneous; the contention is simply whether it was so erroneous as to constitute plain error because counsel for the petitioner did not object to the charge given.

This Court, in *Henderson v. Kibbe*, 431 U.S. 145 (1977), announced the constitutional standard for post-conviction review of a State judgment where there had been no objection to a jury instruction and announced the standard to be "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *See*, also, *Cupp v. Naughton*, 414 U.S. 141, 147 (1974), cited in *Henderson v. Kibbe, supra.* Petitioner respectfully contends that where, as here, the issue was raised on direct review of a federal

conviction it is only necessary to meet the standard of Rule 52 (b), F.R.Cr.P., of showing that the error or defect affects his substantial rights, *viz*., the right to have the jury properly instructed on the reasonable doubt concept without having that standard diluted by other instructions or by a modification of the reasonable doubt standard to that of a preponderance test which it calls the reasonable doubt standard of proof. Nevertheless, petitioner respectfully submits that this case falls squarely within the constitutional plain error rule of *Henderson v. Kibbe, supra,* for the following reasons:

The Government, in its brief to the Court below, pointed out that the Trial Court made reference to the reasonable doubt standard "a total of twenty four times." Appellee's Brief, p. 44. The challenged part of the jury instruction, however, was the fourth sentence of the reasonable doubt instruction and followed three other sentences playing down the high burden of proof which is required for a conviction: "It is rarely possible to prove anything to an absolute certainty. Therefore the law requires in a criminal case that the Government carry the burden of proving the person guilty beyond a reasonable doubt. A reasonable doubt is a fair doubt based upon common sense and arising from the state of the evidence." Tr. 170. Followed then by the statement that the reasonable doubt standard is the equivalent to the kind of evidence the jurors would be willing to rely and act upon in the conduct of their ordinary affairs, the reasonable doubt standard was relegated to the significance of and degree of consideration one might use in deciding whether to purchase a car on a tight budget, *compare United States v. Cummings*, 468 F.2d 274 (9 Cir. 1972), or some other relatively unimportant decision in the personal affairs of jurors, and totally denigrated the reasonable doubt standard to one of simple preponderance of the evidence.

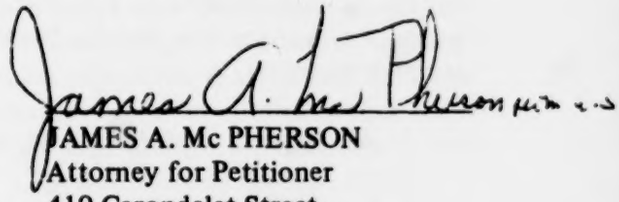
The Court's instruction lost sight of the fact that "[i] n considering the evidence, the jury is bound to bear in mind that the evidence must do more than convince; it must convince

beyond a reasonable doubt." *id* ., at 281. The jury was thus improperly instructed and was permitted to convict petitioner upon less than the reasonable doubt standard. Therefore, petitioner's substantial constitutional rights were denied and the judgment below was obtained on the basis of an improper standard of proof, the one suitable in civil cases only.

CONCLUSION

For the foregoing reasons, this Court should grant a wirt of certiorari in this case and review the judgment of the Court of Appeals rendered herein and, following the issuance of the writ and the consideration of the record and briefs and arguments of counsel, it should reverse the judgment below and remand this matter for a fair trial comporting with constitutional procedures.

Respectfully submitted,



JAMES A. Mc PHERSON
Attorney for Petitioner
419 Carondelet Street
New Orleans, Louisiana 70130
Telephone: [504] 581 - 1973

CERTIFICATE

I, James A. McPherson, attorney for Michael P. Vitale, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of July, 1979, I served copies of the foregoing Petition for a Writ of Certiorari on the parties thereto, as follows:

1. On the Solicitor General of the United States, by mailing a copy in a duly addressed envelope, air mail postage prepaid, certified, return receipt requested, addressed to the Office of the Solicitor General, U. S. Department of Justice, Washington, D. C., and

2. Upon opposing counsel who has represented the United States in the proceedings heretofore had in the Courts below, by mailing a copy in a duly addressed envelope, first class postage prepaid, to the Office of the United States Attorney for the Middle District of Louisiana, Attn: Shelly C. Zwick, Assistant U.S. Attorney, Middle District of Louisiana, this 16th day of July, 1979.

All parties required to be served have been served.

James A. Mc Pherson pour A.S.

JAMES A. Mc PHERSON
Mc PHERSON, WEBER, ZAINEY
& BOOTH
Attorneys for Petitioner
419 Carondelet Street
New Orleans, Louisiana 70130
Telephone: [504] 581 - 1973

APPENDIX A

[5353]

UNITED STATES of America,
Plaintiff - Appellee,

v.

Michael P. Vitale,
Defendant - Appellant.
No. 78-5689
Summary Calendar.*
United States Court of Appeals,
Fifth Circuit.
June 8, 1979

* * * *

[5354]

PER CURIAM:

Michael P. Vitale was charged with the crime of engaging in the business of dealing in firearms without a license. 18 U.S.C. § 922 (a) (1). The parties stipulated that he did not have a license to deal in firearms and Vitale admitted that he had sold some firearms and had arranged for a friend to sell others. The only issue for the jury was whether he was engaged in a business. The jury found that he was. Vitale has appealed to this court, alleging a variety of procedural errors. After a careful review of the issues, we affirm the conviction.

The first contention is that the trial court should not have allowed Detective Mayeux to explain that he went to the bar where he met Vitale because the state police detectives received "information of possible criminal activity conducted at this particular bar." The premise of Vitale's objection is that this testimony was hearsay that should have been excluded. Unquestionably, it should have been excluded if it had been offered for the truth of the matter, that is, to prove that unlawful acts were being committed. ***United States v. Cain***, 5 Cir.

1979, 587 F.2d 678, 680.

[1] This suggestion of a cloud of criminality enveloping the defendant is best not used. There is little legitimate justification for it save to show that the police official was on business, not a vigilante, and, when necessary, such evidence can readily be supplied in some other fashion less prejudicial to the defendant. Yet we have previously allowed police agents to testify in a similar fashion for the limited purpose of explaining why they were at a particular location. See, *e. g. United States v. Gomez*, 5 Cir. 1976, 529 F.2d 412, 416. Fifth Circuit precedent permits such evidence provided that it is simply back ground information showing the police officers did not act without reason and in addition, that it does not point specifically to the defendant. *id.; United State v. Hernandez*, 5 Cir. 1971, 441 F.2d 157, 164, *cert denied*, 404 U.S. 847, 92 S.Ct. 150, 30 L.Ed.2d 84. In this instance, both requirements were fulfilled. Detective Mayeux's brief testimony on this point was a simple explanation of why he was at the bar; the response did not specifically point to Vitale or implicate him personally in any way.

[2] As Vitale points out, the trial court failed to instruct the jury on the limited use of this testimony. Our cases approving testimony of a similar nature have noted that the trial court instructed the jury in its use, *Gomez, supra*, 529 F.2d at 416; *United States v. Herrera*, 5 Cir. 1972, 455 F.2d 157, 158; *Hernandez, supra*, 411 F.2d at 164; and, therefore, the trial court should have instructed the jury on this point. However, at trial, Vitale failed to request such an instruction. The trial court's failure to give the instruction sua sponte was not plain error. F.R.Evid. 105. See, *e.g., United States v. Garcia*, 5 Cir. 1976, 530 F.2d 650, 654-56. Detective Mayeux's statement was not contrary to Vitale's position on any contested question in the case. *Compare Gomez, supra*, 529 F.2d at 417. Thus, the failure to give a limiting instruction was not so prejudicial that Vitale's substantial rights were harmed in any way. *Garcia*, supra, 530 F.2d at 656.

[5355]

[3] Vitale also argues that the testimony should have been excluded because it was unfairly prejudicial under Rule 403, F.R.Evid. However, Vitale did not make this specific objection known to the court at trial, as required by Rule 103(a)(1). Even assuming that the trial court was aware of the nature of the objection, we cannot say that, under Fifth Circuit precedent, the decision to allow this testimony into evidence was an abuse of discretion. *See United States v. Johnson*, 5 Cir. 1977, 558 F.2d 744, 746, *cert denied*, 1978, 434 U.S. 1065, 98 S.Ct. 1241, 55 L.Ed.2d 766.

[4] Vitale's second ground of error is that the trial court incorrectly prevented a witness, Robert Bolds, from answering on Cross-examination a question that was proper under Rule 704, F.R.Evid. However, the alleged error was not preserved for review, because Vitale's attorney failed to make an offer of proof making the substance of the evidence known to the trial court. *See* F.R.Evid. 103(a)(2). Under the law of this circuit, the propriety of a decision to exclude evidence will not be reviewed if an offer of proof was not made at trial. *United States v. Winkle*, 5 Cir. 1979, 587 F.2d 705, 710; *Mills v. Levy*, 5 Cir. 1976, 537 F.2d 1331, 1333.

[5] Vitale next argues that he was entitled to a directed verdict because the government failed to prove that he was in the business of selling guns for profit. Vitale argues that, before *United States v. Shirling*, 5 Cir. 1978, 572 F.2d 532, was decided, the government had been required to prove that the defendant sold guns for profit. This is an incorrect interpretation of *Shirling's* impact on the prior law. *Shirling* simply confirmed that a particular jury instruction on the absence of a profit motive "correctly represented the controlling law." *id.* at 532. There is no merit to the argument that Vitale suffered from a retroactive application of new law, because *shirling* did not alter the terms or interpretation of the firearms statute, a law aimed "rather broadly at those who

hold themselves out as a source of firearms." *id.* at 534. For the same reasons, the trial court properly relied on *Shirling* as the source for the jury charge on profit motive.

[6] Vitale finally asserts that the trial court's instruction on reasonable doubt erroneously charged the test to the less stringent preponderance of the evidence standard. However, because Vitale's attorney did not object to this charge and did not submit his own charge to the court, plain error must be demonstrated. F.R.Cr.P. 52(b). Although one sentence in the charte was not proper, the court's charge, taken as a whole, adequately conveyed the correct meaning of reasonable doubt to the jury. *See United States v. Rodriguez*, 5 Cir. 1978, 585 F.2d 1234, 1241, *reh. en banc granted on other grounds*, 585 F.2d 1251. The court's single misstatement did not cross into plainly forbidden territory.

For these reasons, the conviction is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 78-5689

UNITED STATES OF AMERICA,

Appellee,

VERSUS

MICHAEL P. VITALE,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

MOTION FOR LEAVE TO FILE OUT OF TIME PETITION FOR REHEARING AND MOTION FOR STAY OR RECALL OF MANDATE

Appellant, Michael P. Vitale, appearing herein through undersigned counsel, respectfully moves this Honorable Court to grant leave to file an out-of-time petition for rehearing and to stay or recall the mandate of this Court pending the hearing and determination of the said petition for rehearing, or if leave to file such out-of-time peition is denied, for a recall and stay of the mandate pending application to and determination by the Supreme Court of a petition for writ of certiorari, and as cause for granting the requested relief, it is averred:

1. Undersigned counsel is trial counsel for State Senator Gaston Gerald who is charged in the United States District Court for the Middle District of Louisiana with violations of 18 U.S.C. §§1623 and 1951 in proceedings numbered 79-1 on the Criminal Docket of the said District Court.

2. The Louisiana Legislature has been in session, which has necessitated undersigned counsel going to and working out of his Baton Rouge office for the past two weeks, preparing Senator Gerald's case as the legislative demands upon Senator Gerald's time permits.

3. Undersigned counsel did not personally receive a copy of the opinion of this Court until the week-end of June 16th (his office staff does not open his mail during his absence) and has been attempting to draft a petition for rehearing during his spare time which, because of his busy work schedule (which has, in addition to the time spent in preparing Senator Gerald's case, included meetings with the legislature on unrelated matters and also two State trials), has not been completed.

4. Undersigned counsel did not realize that more than a week had passed since the Court's decision at the time he personally received it and erroneously assumed he had until some time during this week to file the said petition for rehearing.

5. Upon inquiry to the Clerk's Office with regard to an application for an enlargement of the time within which to file the said petition for rehearing, undersigned counsel was informed that the time for filing such petition for rehearing had expired on June 22, 1979, and he was advised that an enlargement of time to file the said motion to enlarge the time for filing a petition for rehearing could be obtained only upon motion for such relief directed to a Judge of this Honorable Court.

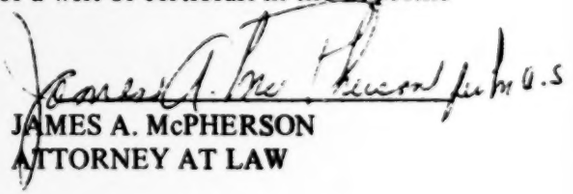
6. Undersigned counsel respectfully submits that there is merit to this appeal and that appellant deserves the opportunity to again try to demonstrate to this Court, or to the Court en banc, that the errors acknowledged to have existed in this require reversal of the judgment below.

7. The petition for rehearing and for rehearing en banc

can be completed and filed by no later than Monday, July 2, 1979, and appellant respectfully requests this Honorable Court to grant him leave to file an out-of-time petition for rehearing by that date in order to present this Court additional arguments upon the merits of this appeal which may have been overlooked in the opinion of this Court and require resolution on this appeal.

8. Pending the hearing of this petition, or if leave is denied to file this petition out of time, then pending application to the Supreme Court for a writ of certiorari to review the judgment of this Court, the mandate should not issue or, if issued by the time this motion is acted upon, then it should be recalled, for the reason that the issues presented by this appeal are not frivolous, several of the issues have been recognized to present error, and if the said errors are not themselves ground for reversal of the judgment below they cumulatively should be sufficient to warrant that relief.

WHEREFORE, appellant prays that he be granted leave to file an out-of-time petition for rehearing on or before July 2, 1979, and that pending the hearing and disposition thereof the mandate be stayed or recalled. Alternatively, appellant prays that the mandate be stayed or recalled pending the timely filing of a petition for a writ of certiorari in the Supreme Court.



JAMES A. McPHERSON
ATTORNEY AT LAW

CERTIFICATE

I, James A. McPherson, attorney for appellant Michael P. Vitale, hereby certify that a copy of the foregoing Motion for Leave to file out-of-time petition for rehearing has been mailed to opposing counsel this ___ day of June, 1979.

JAMES A. McPHERSON
Attorney for Appellant
McPHERSON, WEBER, ZAINEY & BOOTH
419 Carondelet Street
New Orleans, Louisiana 70130
Telephone: [504] 581 - 1973